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659236—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 181

WELLS LAMONT CORPORATION, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR, AND JAMES G. ROGERS, ACTING ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals, originally issued on May 1, 1945, and amended on May 28, 1945 (R. 126–129, R. 139–140), is reported in 149 F. 2d 364.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on May 1, 1945 (R. 130) and the order denying the petition for rehearing on May 28, 1945 (R. 139–140). The

petition for a writ of certiorari was filed June 26, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. III, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTION PRESENTED

Whether the Emergency Court of Appeals was right in holding that the "in-line" pricing system exhibited in petitioner's price list issued on March 17, 1942, was not "an established practice or means or aid to distribution" within the meaning of Section 2 (h) of the Emergency Price Control Act, as amended.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 are those of Section 2 (h) which are set forth in the Appendix to this brief. The relevant provisions of Section 2 of the General Maximum Price Regulation are found at R. 68–69.

STATEMENT

The General Maximum Price Regulation was issued on April 28, 1942, and went into effect on May 11, 1942, with respect to sales at wholesale. On July 10, 1944, petitioner filed its protest

against the Regulation (particularly Section 2 thereof) as interpreted and applied by the Price Administrator to its sales of gloves.[1] Section 2 of the General Maximum Price Regulation provides that a seller's maximum price for any commodity shall be "the highest price charged by the seller during March 1942" for the same commodity. "Highest price charged by a seller during March 1942" is specifically defined as "the highest price which the seller charged for a commodity delivered * * * by him during March 1942 to a purchaser of the same class. * * *." Section 2 also provides that if a seller made no such delivery during March 1942, his highest offering price during that month for a delivery to a purchaser of the same class shall be his maximum price.

During 1941, petitioner manufactured and offered for sale approximately 340 styles of work

[1] On two prior occasions, October 24 and December 31, 1943, petitioner filed protests embodying substantially the same objections. These protests were dismissed by the Price Administrator as untimely on November 24, 1943 and February 7, 1944. Subsequent to dismissal of these protests, petitioner filed two complaints in the Emergency Court of Appeals and the proceedings were there consolidated as Case Nos. 112 and 129. On July 7, 1944, by agreement of the parties, the consolidated proceeding was dismissed by the Emergency Court of Appeals without prejudice to petitioner's filing a new protest "with respect to the same regulation provisions and involving the same or substantially the same subject matter and grounds for objection". (R. 54, n. 1.)

and seasonal, semi-dress gloves listed in its Catalog No. 33 (Exhibit B; R. 38). On December 1, 1941, petitioner issued a price list for practically all of the styles described in the catalog. On January 22, 1942, it issued a letter-notice to its customers withdrawing the December 1941 price list and announcing that its entire production of work gloves for the first quarter of 1942 had been sold (Exhibit G; R. 52). During March 1942, petitioner made deliveries of at least 112 styles at prices found in the December 1, 1941 price list (Exhibit E; R. 39–40; Schedules A, B, C and D to Exhibit F; R. 44–51). Of these 112 styles delivered in March at December 1941 list prices, 10 involved commitments or sales made during March (R. 42); and the remaining 102 styles represented orders taken prior to March.

On March 17, 1942, petitioner issued a new price list for approximately 304 styles of gloves described in its catalog, incorporating a higher schedule of prices than those quoted for the same styles in the December 1, 1941, price list (Exhibit C; R. 30–37). The petition (at pages 9–10) states that the prices in the March 17, 1942, price list were approximately 10% higher than those in the December 1941 list.

While at least 112 styles were delivered in March 1942 at December 1941 prices, 13 other styles were delivered in March at the higher March 17, 1942, list prices (Schedules A, B, C and

D to Exhibit F; R. 44–51).[2] During the March 1942 base period, petitioner delivered, pursuant to commitments made during that month, 10 styles at December 1, 1941, prices and 13 styles at the higher March 17, 1942, prices (Exhibit F; R. 42; Schedules A, B, C and D to Exhibit F; R. 44–51). In sum, during March, a total of at least 125 styles were delivered—112 at December 1941 prices and 13 at March 17, 1942, prices.

Petitioner, in its protest, objected to both the interpretation and the validity of the General Maximum Price Regulation insofar as the Regulation was applied to establish its maximum prices by reference to deliveries during March 1942 at prices set forth in the December 1, 1941, price list. Petitioner sought to justify charging higher prices for 112 styles of gloves delivered during March 1942, at December 1, 1941, prices, and, in fact, for all styles of gloves generally after March 17, 1942, on the ground that it issued a new higher price list on March 17, 1942, delivered 13 styles during that month at the higher list prices, and therefore had a right to resort to the March 17 price quotations for all 300 styles. The process by which this is accomplished is described as "in-line pricing" (R. 3–5, 7; 92–96). This system of "in-line pricing," petitioner asserted, is a "business practice and means or aid to distribu-

[2] Style numbers 12, 8, 256L, 626, 699, 326, 3102, 3130, 103, 115, 884, 874, and 959. Although the record does not disclose the fact, complainant asserted in its reply brief in the court below that 42 additional styles were delivered in March at the March 17 prices, making 55 in all.

tion" established in the industry and as such protected by Section 2 (h) of the Act from interference by the Price Administrator.[3]

On September 2, 1944, the Price Administrator denied petitioner's protest (R. 53). The opinion (R. 54–63) held that "the so-called 'in-line pricing' techniques * * * do not come within the protective scope of Section 2 (h). 'In-line pricing' is a pricing practice—not a business practice," citing *Philadelphia Coke Co.* v. *Bowles,* 139 F. (2d) 349 (E. C. A.). (R. 60.) After stating that "although 'in-line pricing' is not a business practice within the meaning of Section 2 (h)," the Administrator's opinion went on to make the following finding: "the Administrator deems it proper to observe that many of

[3] Petitioner alleges that the "in-line pricing" system is based on the establishment and maintenance of "standardized differentials" in price between different styles of gloves falling within the same general classification founded on material and type of construction (Pet. 6–9). Petitioner refers to "subject gloves" and "base gloves." Base gloves are evidently those standard types by reference to which other styles are priced according to "customary" differentials. Petitioner points out that a general increase in prices may be put into effect without changing the cent-amount of the various differentials (Pet. 25–26). By raising the prices of the "base gloves," petitioner contends that increased in-line prices with respect to other styles automatically result from "the application of traditional or customary price differentials * * *" (R. 3). Petitioner's position is that the March 17, 1942, price list incorporates a higher schedule of prices for all of its styles generally in correct balance and relationship to each other—carrying over the "customary differentials" of the December 1941 price list.

the ramifications of 'in-line pricing' generally described in the protest are not only irreconcilable with the Regulation itself, but their application would lead to circumvention and evasion, and render practicable enforcement difficult." (R. 60–61.)

On September 28, 1944, petitioner filed its complaint with the Emergency Court of Appeals (R. 89–104). The Price Administrator's answer admitted "* * * that there are certain pricing practices in general use in the glove industry, commonly referred to as 'in-line pricing'", and then stated "affirmatively that such pricing practices are not uniformly or consistently applied but exhibit varying deviations in practice." (R. 108.) The answer also affirmatively stated that "in most instances, the March 17, 1942, price list * * * incorporates the same differentials as those included in its December 1941 price list, but in a substantial number of cases the differentials in the March 17, 1942 price list are different from those found in the December 1, 1941, price list." It also denied "that the pricing methods referred to * * * were proper under the General Maximum Price Regulation" but admitted that "Complaintant purported to determine its ceiling prices according to such methods." (R. 108–109.)

At the oral argument before the Emergency Court of Appeals the petitioner abandoned, for the purposes of the proceeding, its attack upon the

correctness of the Administrator's interpretation of the General Maximum Price Regulation. The court below therefore confined its attention to the objection that the Regulation as interpreted was in contravention of Section 2 (h) of the Act, and dismissed the complaint on the ground that (R. 140):

> * * * the proof does not disclose an established business practice or means or aid to distribution. We are unable to say as a matter of law that the Administrator was arbitrary and capricious in failing to frame the regulation so as to protect something which was not uniform, settled or established. Rather we think the Administrator had before him substantial evidence to support his position that, while in-line pricing may represent a general tendency in the industry, it was not applied with precision by complainant, was not consistently or uniformly applied by it, and fell far short of an established practice or means or aid to distribution.

ARGUMENT

1. Petitioner's basic contention is that the "in-line pricing" system exhibited by its March 17, 1942, price list is an established practice and means or aid to distribution within the meaning of Section 2 (h) of the Act and as such is protected against interference by the Price Administrator. In support of this contention petitioner has attacked as contrary to the evidence both the finding

of the court below that the "in-line pricing" system was not applied with sufficient uniformity and consistency to be regarded as an "established practice" within the meaning of Section 2 (h) (Pet. 23) and the finding of the Administrator, relevant to denial of exemption under Section 2 (h), that the ramifications of in-line pricing would lead to circumvention and evasion and render practical enforcement difficult (Pet. 28). Thus, the petition presents no questions of general significance but merely an attack upon certain factual determinations made by the Administrator and the Emergency Court of Appeals.

There was clearly ample evidence in the record to support the conclusion of the court below with respect to the lack of uniformity and consistency in the operation of in-line pricing as exemplified by petitioner. There was, for example, evidence that in approximately 25 instances referred to in the record, the differentials between the so-called "base gloves" and others in the same class were not the same in the March 1942 price list as they were in the December 1941 list. So, too, the schedules attached to petitioner's protest show substantial variations in the type of gloves used as the base glove. The petitioner cites as illustrative of the way in which in-line pricing operates the fact that the eight-ounce cotton flannel glove was customarily used as a base for pricing gloves of the same material in other weights. But the schedules show that the twelve-ounce flannel

gauntlet (Style No. 5) is claimed to be in line by comparison with the twelve-ounce flannel knit wrist (Style No. 12) referred to as the base glove delivered in March 1942; a ten-ounce type reenforced (Style No. 263) by comparison with a seven-ounce flannel elastic web (Style No. 256L), and a nine-ounce flannel gauntlet (Style No. 93) type by comparison with a twelve-ounce flannel knit wrist (Style No. 12) (R. 44–45, 48). In short, the eight-ounce cotton glove was not used consistently as a base in establishing the price of other gloves of the same material.

Petitioner's attempted explanations of these variations only emphasize the looseness of the alleged practice. Petitioner conceded that "in-line pricing" itself includes the right to make "adjustments" in differentials (see Pet. 25). According to petitioner, it did not mean that once fixed, a particular differential would never change. Occasions for such change might include material cost increases, construction requiring additional material, and realignment of price where it had assertedly been held down to permit resale within retailers' customary price ranges, etc. (Pet. 25). In other words, the so-called standardized differentials were fixed only "in the main" (Pet. 6, 9) and are indeed varying factors, depending on costs, merchandising considerations, and the like. The essential looseness of such a system is further illuminated by the fact that it is based on the

privilege of each manufacturer to determine for himself, not according to consistent, objective standards recognizable by others, the identity of base gloves. For example, petitioner described as so-called "base gloves" 13 styles delivered in March at March 17, 1942, list prices. There is no way of knowing whether a particular style is a base glove until the manufacturer determines and announces that fact. There is no objective standard by which to measure the raising of prices on "base gloves" or the "adjustment" of differentials applicable to others. The subjective character of "base gloves" merely provides sellers another form of controlling differentials and selling prices.

The characteristically factual type of controversy presented is borne out by the foregoing analysis as well as the discussion offered at pages 23 to 26 of the petition. This Court has held that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited" (*N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 131). "* * * When the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand." *Dobson* v. *Comm'r,* 320 U. S. 489, 502. These principles are also peculiarly applicable to review of a court of specialized jurisdiction such as the Emergency Court of Appeals.

2. Petitioner contends that the Price Administrator made "binding admissions" that "in-line pricing" was "essential" and the "only practicable way" of pricing gloves, and, in effect, that it was an established means or aid to distribution. It is clear, however, from the answer filed to the complaint that no such admissions were made. The Price Administrator there stated that while "there are certain pricing practices in general use in the glove industry, commonly referred to as 'in-line pricing,'" "such pricing practices are not uniformly or consistently applied but exhibit varying deviations in practice." (R. 108–109.) The Administrator in his opinion denying the protest also reached substantially the same conclusion as the Emergency Court of Appeals when he held that "many of the ramifications of in-line pricing * * * would lead to circumvention and evasion, and render practicable enforcement difficult." (R. 60–61.) In addition, the Administrator characterized "in-line pricing" as a "pricing practice" rather than a "business practice" and, as such, not within the protective scope of Section 2 (h). (R. 60.) In support of this position, the Price Administrator relied upon the decision of the Emergency Court of Appeals in *Philadelphia Coke Company* v. *Bowles,* 139 F. (2) 349 (E. C. A.), recently reaffirmed in *Seaboard Oil Company of Delaware, et al.* v. *Bowles,* E. C. A., decided June 7, 1945.

3. Petitioner maintains that the decision of the Emergency Court of Appeals was unreasonable on its face in holding that a practice, to be within the protection of Section 2 (h), must be "forever unvarying" (Pet. 18). The court's final opinion, however, makes no reference to "unvarying" (R. 139–140). The court did say that the word practice implies "uniformity and continuity"; that "to establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or fix unalterably." (R. 139.) In the context here presented there can be no doubt of the necessity for uniformity and consistency to bring the alleged practice within the protection of Section 2 (h). Petitioner has asserted that the General Maximum Price Regulation is invalid insofar as it prohibits him from following pricing techniques that he has customarily followed, and that he is entitled as a matter of law to maximum prices established in accordance with those techniques. Yet those pricing techniques are so varied as to leave a wide area of discretion to petitioner in the selection of the prices which he asserts are outside of control of the Price Administrator. Bearing in mind the intent of Section 2 (h) to prevent the Price Administrator from going beyond his legitimate price control functions in order to revamp industry practices, it is hardly disputable that the pricing techniques involved here are not within the protection of that section. Cf. *United States*

Gypsum Co. v. *Brown,* 137 F. (2) 803, 808–809 (E. C. A.).

4. But even if there were doubt as to the correctness of the conclusion of the court below that "in-line pricing" has not been shown to be a practice established in the industry within the meaning of Section 2 (h), interference with that practice would still be justified under Section 2 (h) on the ground that it was necessary, as the Administrator found, in order to prevent circumvention and evasion. The variations already referred to indicate the incompatability of the alleged practice with effective price control. Petitioner claims by virtue of "in-line pricing" the right to "adjust" differentials and to designate "base gloves"; every other seller of work gloves would be equally entitled to make the same determination in accordance with his own judgment. Clearly, recognition of such pricing methods as beyond the scope of the Price Administrator's control would be inconsistent with the qualification which Congress explicitly embodied in Section 2 (h).

5. There are certain subsidiary questions suggested by the petition which should be clarified. Petitioner asserts that the Price Administrator changed his interpretation of Section 2 of the General Maximum Price Regulation when he informed the petitioner that prices charged for deliveries in March 1942 would be the maximum

prices for the style so delivered, irrespective of whether deliveries were priced in accordance with the December 1941 price list or the March 1942 list (Pet. 11). But the official interpretation of Section 2 of the Regulation, consistently and uniformly applied by the Administrator, has been that the highest price charged for a commodity delivered in March 1942 is determinative of the seller's maximum price for the same commodity. The reasonableness of the Price Administrator's interpretation with respect to a similar regulation has recently been recognized by this Court. *Seminole Rock and Sand Co.* v. *Bowles,* No. 914, October Term, 1944, decided June 4, 1945. Petitioner also asserts that it would have been subjected "to severe hardship" if it had to maintain its December 1941 prices (Pet. 10). While this general assertion was made in the protest (R. 3), it has never been supported by corroborative evidence.

CONCLUSION

The decision of the Emergency Court of Appeals is sound and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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JULY 1945.